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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 267

ROBERT ALLEN, CLAIMANT,

Appellant,

vs.

THE GLENN L. MARTIN COMPANY, EMPLOYER, AND GLOBE INDEMNITY COMPANY, INSURER,

Appellees

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Now comes Robert Allen, appellant and claimant in this case, and petitioner for the allowance of an appeal from the final decision and judgment of the Court of Appeals of Maryland to the Supreme Court of the United States, and makes the following statement of the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decision and judgment in question.

1. The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, Section 237(a), as amended (January 31, 1928,

c. 14, Sec. 1, 45 Stat. 54), the pertinent provisions of which are as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, • • • where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

2. The Maryland statute, the validity of which, as judicially interpreted by the Court of Appeals of Maryland, and as amended by such judicial interpretation, and as applied and enforced in this case, is involved, is the "other cases" provision of the Workmen's Compensation Act of Maryland, Article 101, Section 48(3), Code of Public General Laws of Maryland, 1939 (Flack's 1943 Supp. to the Code, at p. 1144). As enacted, and effective on the date of appellant's injury, August 30, 1944, and applicable to this case, the provision (since amended by Laws of 1945, Ch. 336, and Laws of 1947, Ch. 895), reads as follows:

> "Other Cases—In all other cases in this class of disability the compensation shall be fifty per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment, or otherwise, if less than before the accident (but not to exceed eighteen dollars per week), payable during the continuance of such partial disability, but not to exceed three thousand dollars, and, subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest."

In construing that provision, and applying and enforcing it in this case, the Court of Appeals of Maryland in its opinion herein said (52 A. 2d. 605, 608, 610):

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"Appellant argues * * * that there should have been no limit less than $3,000 on the amount of permanent partial disability allowed. * * * that the Commission has the duty to determine the average weekly wage and the wage earning capacity and to fix the weekly payments at 50% of the difference between the two. * * * that the Commission has no power to limit the number of weeks as long as the permanent partial disability continues, and that the only limitation, unless there is a subsequent modification or death, is when the aggregate weekly payments reach the maximum fixed by the statute. He argues that to limit it otherwise is unconstitutional, * * *.

"The statute under 'other cases,' and as interpreted by this Court, sets a maximum limit as to the amount of compensation to be allowed and gives to the Commission the right to determine the amount to be paid within this limit. * * *

"In the case at bar, as the claimant was awarded the maximum weekly payment, there was no question of fact for the jury or for the court sitting as a jury on appeal. * * *

"In effect, our construction, of the 'other cases' provision is that the aggregate amount of compensation shall be determined in the discretion of the Commission, in each case having due regard to the character of the permanent partial disability, and the impairment of wage earning capacity therefrom, as compared with the scheduled cases of permanent partial disability specifically provided for."

In construing the "other cases" provision in *Townsend* v. *Bethlehem-Fairfield Shipyard, Inc.* (1946), 47 A. 2d 365, the Court of Appeals of Maryland said (at pp. 370-371 of 47 A. 2d):

"The precise point made by appellant is that the 'other cases' section requires payment 'during the continuance of such partial disability,' without any limitation except that such payments shall not exceed $3,000.

> • • • Whether the Legislature intended this or not, there is no means of ascertaining except by the words of the statute. The clear unambiguous words used seem to indicate that it did so intend, and if this were the first time this question was before this Court, we might so hold. The question now, however, is not so simple. It becomes an issue between the two doctrines of stare decisis on the one hand, and constitutional lack of authority in the Court to legislate on the other.
>
> "It is interesting to note that in a number of jurisdictions and states, where similar clauses are in compensation acts, with a limitation, either as to amount, or as to number of weeks, the courts have held that there is no discretion to give less than the limitation. • • • On the other hand, • • • there are a number of states which, by statute, confer upon accident boards and commissions discretion to limit the amount or duration of such payments to a sum or period less than the maximum named. That is the effect of the prior decisions of this Court construing the 'Other Cases' section, which by judicial interpretation, reach the same result achieved in these other states by unequivocal statutory provisions."

In construing the same provision in *Miller* v. *McGraw Co.*, 184 Md. 529, the Court of Appeals of Maryland said (pp. 539-541):

> "The preceding paragraphs under the same subsection, captioned 'Permanent Partial Disability,' deal with the loss, or loss of use, of specified members of the body and provide a schedule of compensation on a fixed weekly basis. It is to be noted, however, that the 'Other Cases' paragraph prescribes no such basis or schedule and gives no specific authority to the Commission to fix the number of weeks. • • •
>
> "Although the statute prescribes that these payments shall be made 'during the continuance of such partial disability' and the subsection we are now discussing pertains to the type of disability that is

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'permanent,' thus indicating, if literally construed, that every claimant under the 'Other Cases' paragraph would ultimately get the limit of $3,000 compensation, this Court has not adopted such a construction. We have held that, in accordance with this paragraph, the State Industrial Accident Commission may fix the amount and the number of weekly payments, and set an aggregate sum less than the statutory limit of $3,000. "* * * we hold that * * * the Commission may ascertain the amount of compensation on the basis prescribed in the 'Other Cases' paragraph of the statute, as hereinbefore construed, and may fix the number and amount of weekly payments, not to exceed, however, the sum of $3,000 in the aggregate."

3. The date of the judgment of the Court of Appeals of Maryland sought to be reviewed is May 17, 1947, being the date of the issuing by that Court of its mandate in this case. The date of the filing of the opinion of the Court of Appeals of Maryland is April 17, 1947. The date the application for appeal to the Supreme Court of the United States is presented is July 11th, 1947.

4. The jurisdictional provisions relied on, Judicial Code, Section 237(a), as amended (January 31, 1928, c. 14, Sec. 1, 45 Stat. 54), confer jurisdiction on the Supreme Court of the United States to review upon appeal the judgment of the Court of Appeals of Maryland because the case involves, and the controlling question in it is, the constitutional validity of a statute, above quoted, of Maryland, Article 101, Section 48(3), Code of Public General Laws of Maryland, 1939, as amended by judicial interpretation and applied and enforced in this case by the Court of Appeals, the highest Court of Maryland. The ruling of the Court of Appeals of Maryland, and its decision and judgment, were in favor of the validity of the statute as construed. In those circumstances the Supreme Court of the United States has jurisdiction on appeal. *Standard Oil Co. of*

California v. *Johnson*, 316 U. S. 481, *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, *Fiske* v. *Kansas*, 274 U. S. 380, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, *New York Cent. R. Co.* v. *Bianc*, 250 U. S. 596, *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400.

5. Appellant's contention and claim that the "other cases" provision of the Workmen's Compensation Act of Maryland, as amended by judicial interpretation and applied and enforced in this case, is repugnant to the 14th Amendment to the Federal Constitution for the reasons that, under the statute as construed, the Commission is given unlimited authority and discretion to allow compensation, in an amount less than that required by the provisions to be paid, without any prescribed guide, rule, basis or standard reasonably adapted to produce a fair result, and is also given unbridled and definitive discretion to accord claimants discriminatory treatment, involve substantial questions, because appellant's right to adequate and reasonable compensation for his conceded permanent disability depends entirely upon whether the statute may constitutionally be construed and judicially amended in a manner calculated to deprive him of compensation to which the statute as enacted expressly, clearly and unequivocally entitles him. The questions are substantial, moreover, because they arise upon a claim of unconstitutionality which the Supreme Court of the United States in previous decisions has recognized as substantial and valid in applying the principles, here seasonably invoked by appellant, that it is violative of due process of law, as well as the equal protection of the laws, for a statute to delegate to an administrative body unlimited discretion and authority unless they are reasonably restricted by legislative imposed standards wherewith to govern them

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(*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, *Panama Refining Co.* v. *Ryan*, 293 U. S. 398, *Missouri, ex rel. Gaines* v. *Canada, Registrar*, 305 U. S. 337).

6. The federal questions sought to be reviewed were initially raised by written answer of appellant filed in the Baltimore City Court the court of first instance, to a motion of appellees to dismiss the appellant's appeal to that Court (as authorized by Article 101, Section 70, Code of Public General Laws of Maryland, 1939) from the decision of the State Industrial Accident Commission of Maryland. Under the decision of the Commission, appellant, who was found to have sustained an accidental injury arising out of and in the course of his employment by The Glenn L. Martin Company on August 30, 1944, was awarded compensation for permanent partial disability to his back, resulting from his injury, at the rate of $18 a week for 41-2/3 weeks, not to exceed, however, the sum of $750, under the "other cases" provision of the Act. Pending the trial in the Baltimore City Court of the appeal from the Commission, the Court of Appeals of Maryland filed its opinion in the case of *Townsend* v. *Bethlehem-Fairfield Shipyard, Inc.*, 47A. 2d 365, in which it held that, in a case compensable under the "other cases" provision of the Act, the Commission had the right in its discretion to limit the amount of compensation to a sum less than the amount required to be paid by that provision, and that if the payments were awarded at the maximum weekly rate stated therein, no appeal would lie from the Commission's decision. Excerpts from the opinion of the Court of Appeals of Maryland in the *Townsend* case, showing wherein it amended by judicial interpretation the "other cases" provision of the Act, are quoted (*supra*) in this statement pages 3-4.

7. Thereupon the employer and its insurer, Globe Indemnity Company, moved in writing in the Baltimore City Court to dismiss appellant's appeal from the Commission upon the grounds that under the decision in the *Townsend* case no appeal was allowable from a decision of the Commission limiting its award under the "other cases" provision of the Act to less than the amount required by that provision to be paid, namely, $3,000, and that, as the weekly compensation rate had been fixed by the Commission at the maximum amount permitted by the provision, namely, $18, there was no question which the Court or a jury could review on the appeal to the Baltimore City Court. An order *nisi* on the motion of the employer and insurer to dismiss appellant's appeal was issued directed to appellant, requiring him to show cause why his appeal from the Commission to the Baltimore City Court should not be dismissed.

8. In response to the motion to dismiss his appeal, and by way of showing cause as required in the order *nisi*, appellant filed his written answer mentioned hereinabove in paragraph No. 6, and containing the following, among other, averments:

> "III. * * * Further answering the motion the claimant states that it is also his purpose to challenge the constitutional validity of the subsection as interpreted, applied and enforced by the Commission under approval and sanction of the Court of Appeals, because under the facts in his case the application and enforcement of the subsection as so interpreted is arbitrary, capricious and fundamentally unjust.
>
> "IV. Further answering the motion to dismiss, and showing cause as required by the aforesaid Order of this Court, the claimant respectfully shows that the Legislature of Maryland, in enacting the 'other cases' provision of the Workmen's Compensation Act, subsection 3 of Section 48, Article 101 of the Code, has recognized and established the right of compensation to injured workmen, whose disabilities are partial in

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character and permanent in quality and cognizable under that subsection, by providing that such compensation shall be at a weekly rate to be determined under a fair and reasonable rule as therein stated and payable for a precisely limited time, viz., during the continuance of such partial disability, but not to exceed three thousand dollars, and, subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest. Thus the Legislature prescribed a scale reasonably adapted to produce a fair result in all cases compensable under that subsection. However, by the above mentioned decision and holding (*Townsend v. Bethlehem-Fairfield Shipyard, Inc.*), in construction of that provision of the subsection, the effect of which is at total variance to the clear and unambiguous statutory requirements of the subsection, the Court of Appeals has given sanction to an interpretation of the statute by the Commission whereby that body is authorized and permitted to determine the total amount of compensation to be paid under the subsection in an arbitrary, capricious and fundamentally unjust manner, and to fix, determine and award amounts of compensation payable thereunder in a lesser total sum than the amount stated, fixed, determined and required by the Legislature in said subsection to be paid. All this is sanctioned to be done in the uninhibited and unhamalled discretion of the Commission without any guide, standard, basis, or rule to be followed or conformed to so as fully and fairly to compensate claimants whose claims are compensable under that subsection. The discretion so recognized in the Commission is wholly in derogation and nullification of the statute's plain mandate and in disregard of its scope, intention and effect, and deprives the claimant of the right to have such arbitrary, capricious and unjust determinations and awards of the Commission reviewed in any manner. The result is that the subsection, as applied and enforced by the Commission under the sanction and with the approval of the Court of Appeals, is repugnant to the 14th Amendment to the Constitution of the United

States, abridges the privileges and immunities of citizens, deprives persons of property without due process of law and denies to them the equal protection of the laws, which said privileges, immunities, property and property rights are guaranteed against infringement and impairment by the 14th Amendment and by the 23d Article of the Declaration of Rights of Maryland.

• • • • • • •

"By virtue of the unconstitutional, illegal, arbitrary and unjust authority and prerogatives so conferred upon and vested in the Commission by the aforesaid construction of the subsection by the Court of Appeals, and as the subsection has been in this case applied and enforced by the Commission, and of the power and authority unconstitutionally vested in that body arbitrarily and capriciously to fix, determine and award amounts of compensation payable under the subsection in a lesser total sum than the amount stated, fixed, determined, and required by it to be paid, in its uninhibited and unhamalled discretion, and without any guide, standard, basis or rule to follow or conform to in arriving at such amount, the claimant in the instant case has been unconstitutionally, illegally, unreasonably, arbitrarily and capriciously discriminated against by the Commission; his privileges and immunities have been abridged and destroyed; he has been denied and deprived of his rights and property without due process of law and denied the equal protection of the laws, which said privileges, immunities, rights and property are guaranteed him against such abridgement, destruction, denial and deprivation as well as against any infringement and impairment by the 14th Amendment to the Constitution of the United States and by the 23d Article of the Declaration of Rights of Maryland."

9. Appellant's said answer contained the following prayer, among others, for affirmative relief:

"(b) That this Honorable Court rule as a matter of law that the State Industrial Accident Commission, by

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limiting the amount of the compensation award to the claimant for his permanent partial disability to his back to the sum of $750, instead of making the weekly payments under said award payable during the continuance of such partial disability, but not to exceed three thousand dollars, and, subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest, as required by the provisions of subsection 3, Section 48, Article 101 of the Code, has acted unconstitutionally, illegally, arbitrarily, capriciously and unreasonably and in violation, abridgement and destruction of the fundamental rights of the claimant in that the award was not made in accordance with but in contravention of the said statute, nor made according to a prescribed scale reasonably adapted to produce a fair result and to compensate him for his disability, and therefore abridges and destroys his privileges and immunities, denies and deprives him of his rights and property without due process of law, and denies him the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States and the 23d Article of the Declaration of Rights of Maryland."

10. Appellant's answer to the motion to dismiss his appeal from the Commission contained, further, detailed factual allegations, supported by exhibits in the form of Tables containing a summary and analysis of all cases under the "other cases" provision of the Act decided for a period of a year by the Commission, establishing that the Commission did not follow or conform to any uniform guide, rule, basis or standard in arriving at the total amounts awarded by it to claimants under that provision. Appellant alleged, specifically, that because the Court of Appeals altogether omitted, in its amendatory construction of the "other cases" provision, to lay down any guide, rule, basis or standard to be followed by the Commission in making awards under it, the effect of the statute as thus construed

was to permit the Commission to pursue any method which any of the Commissioners saw fit to adopt from time to time. This, appellant averred, rendered the statute, as so construed and as administered and applied, unconstitutional.

11. Thereafter, at the hearing or trial of the case in the Baltimore City Court on the motion to dismiss the appeal from the Commission and appellant's answer thereto, appellant, in support of the factual averments of his answer, adduced the testimony of the members of the Commission who heard and decided this case. A purpose of that testimony was to show that the Commission, in its awards to claimant under the "other cases" provision of the Act, had made a practice of awarding the maximum weekly amount in each case, and had indicated the percentage of loss of wage-earning capacity found by the percentage of the maximum given as the limit of the particular award. That practice, which the Court of Appeals in the *Townsend* case (47 A. 2d at p. 372) had expressly and specifically condemned as wrong under the statute, was clearly established by the testimony of the Commissioner. The trial Court, on motion of the employer and insurer, made both in writing and orally at the trial, struck out all factual allegations of the appellant's answer and all testimony, including that of the Commissioner, and exhibits relating to matters and findings other than those directly connected with appellant's case before the Commission. In the testimony of the Commissioner which the trial Court permitted to remain in the record it was plainly shown that the amount of compensation awarded appellant, $750, was arrived at by determining the percentage of disability sustained by appellant to his back, to wit, 25%, and applying that percentage to the maximum amount allowed by the statute, $3,000.

12. The trial Court refused the relief prayed by appellant in his answer to the motion to dismiss his appeal from the

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Commission, and remanded the case to the Commission to determine the loss of appellant's wage-earning capacity. Whereupon, appellant in writing moved the trial Court to rescind its order as beyond its statutory jurisdiction and as improper and inconclusive, which motion the trial Court denied. From the trial Court's order and denial of appellant's motion to thus rescind its order, he appealed to the Court of Appeals of Maryland.

13. In the Court of Appeals of Maryland the Federal questions sought to be reviewed were raised in the customary manner in appellant's printed brief filed in that Court and in the oral argument of his counsel to the Court of Appeals. In appellant's printed brief (p. 6), the Federal questions were submitted as follows:

> "III. May an administrative body constitutionally be given unlimited authority and discretion to allow compensation for permanent partial disability, under the 'other cases' provision of the Act, to an injured employee, within a certain maximum, without some prescribed guide, rule, basis or standard reasonably adapted to produce a fair result, when said administrative body, in construing and applying the authority and discretion granted it does not allow compensation to injured employees in such manner as reasonably to compensate them for the disabilities sustained?
>
> "It is the appellant's intention, by this contention, to present and preserve the question of whether the 'other cases' provision of the statute, as construed and applied, is valid under the provisions of the 14th Amendment to the Constitution of the United States, and also under the provisions of the 23rd Article of the Declaration of Rights of Maryland."

14. In its opinion and decision sustaining the constitutional validity of the "other cases" provision of the Act, as it was construing and interpreting it, the Court of Ap-

peals of Maryland said in this case (52 A. 2d at pp. 606, 608):

> "The decision of this Court in the case of *Townsend v. Bethlehem-Fairfield Shipyard, Inc.*, Md., 47 A. 2d 365, having been filed, the appellees filed in the Baltimore City Court a motion to dismiss appellant's appeal, to which motion appellant answered. * * * Appellant contends * * * (3) that the 'other cases' provision of the statute as interpreted by the decision of this Court in the case of *Townsend v. Bethlehem-Fairfield Shipyard, Inc., supra*, is unconstitutional.
>
> "* * * He argues here that to limit it (the number of weeks) otherwise is unconstitutional, in that there is a deprivation to the appellant without due process contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States and of the Twenty-third Article of the Declaration of Rights of Maryland, because the 'other cases' paragraph, as construed, sets up no valid guide or standard whereby a lesser amount may be determined. * * * However, the contention that the statute is unconstitutional is without merit."

15. The Court of Appeals of Maryland in its decision further found no error in the trial Court's ruling excluding evidence, but found formal error in the order of the trial Court remanding the case to the Commission, because of which the case was, by the Court of Appeals, reversed and remanded with directions, however, for the entry of a judgment affirming the decision of the Commission. The mandate of the Court of Appeals of Maryland is dated May 17, 1947, and was issued and sent to the trial Court, the Baltimore City Court, on May 17, 1947.

16. The judgment of the Court of Appeals of Maryland embodied in its opinion, decision and mandate is a final judgment, because the direction to the Baltimore City Court to enter judgment affirming the decision of the State Indus-

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trial Accident Commission finally terminates the case and leaves no discretionary act to be done by the lower Court. On this point see: *Mower* v. *Fletcher*, 114 U. S. 127, *Board of Commissioners* v. *Lucas*, 93 U. S. 108, *Chesapeake & P. T. Co.* v. *Manning*, 186 U. S. 238, *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, *North Carolina R. R. Co.* v. *Story*, 268 U. S. 288.

17. A copy of the opinion of the Court of Appeals of Maryland is hereto appended.

PAUL BERMAN,
SIGMUND LEVIN,
THEODORE B. BERMAN,
Attorneys for Appellant.

APPENDIX

COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1946

No. 100

ALLEN

v.

GLENN L. MARTIN CO., et al.

Before Marbury, C. J., and Delaplaine, Collins, Garson, Henderson and Markell, JJ.

COLLINS, *Judge:*

Robert Allen, claimant, appellant, an employee of the Glenn L. Martin Company, earning an average weekly pay of $70.20, was injured on August 30, 1944, by falling off a bench.

On June 6, 1945, he filed a claim for compensation with the State Industrial Accident Commission alleging that he sustained permanent partial disability to his back. A hearing was held before that Commission on September 20, 1945, when appellant appeared and presented a medical report from the doctor who had examined him at the instance of his attorney. The appellees also produced a doctor who had examined the appellant. Appellant's doctor's report showed that the disability of appellant's back was about 25%, and the other doctor testified that appellant had about 25% loss of use of his back. Claimant lost no time from work. After the hearing the State Industrial Accident Commission passed an order that Glenn L. Martin Company, employer, and Globe Indemnity Company, insurer, appellees here, pay unto the claimant for permanent partial disability to his back, compensation at the rate of $18 per week, payable weekly and for the period of 41⅔ weeks, not to exceed, however, the sum of $750 under "Other Cases." From that decision the appellant appealed to the Baltimore City Court.

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The decision of this Court in the case of Townsend *v.* Bethlehem-Fairfield Shipyard, Inc., Md., 47 A. 2d 365, having been filed, the appellees filed in the Baltimore City Court a motion to dismiss appellant's appeal, to which motion appellant answered. At the hearing on these motions, Dr. Thomas W. Koon, a member of the State Industrial Accident Commission, called by the appellant, testified as to the method used by him in arriving at the decision of the State Industrial Accident Commission in this case. The Baltimore City Court, on November 22, 1946, passed an order remanding the cause to the State Industrial Accident Commission for further proceedings, "to determine the loss of wage earning capacity of claimant, if any, and such other pertinent matters as may be properly heard by the Commission in connection therewith." From that order of November 30, 1946, the appellant appealed to this Court. Appellant contends (1) that there was error in the Trial Court remanding the case to the State Industrial Accident Commission; (2) that the Trial Court erred in expunging from appellant's answer to appellee's motion to dismiss the appeal, Exhibits A, B and C, and the testimony of Commissioner Thomas W. Koon relating to the method used by the Commission in all cases in arriving at amounts awarded under "Other Cases" provision of the statute, Code Supp. 1943, art. 101, § 48, except the instant case; (3) that the "Other Cases" provision of the statute as interpreted by the decision of this Court in the case of Townsend *v.* Bethlehem-Fairfield Shipyard, Inc., supra, is unconstitutional.

(1) Appellant contends that there was error in the Trial Court remanding the case to the State Industrial Accident Commission. The appellees, on the other hand, contend that this order was proper and, as it was not a final order, that the appellant has no right of appeal to this Court from that order. *Hazlehurst v. Morris,* 28 Md. 67, 71; *Newbold v. Green,* 122 Md. 648, 651, 90 A. 513. Under the provisions of Code 1939, Article 101, Section 70 (now Section 57), on an appeal from a decision of the State Industrial Accident Commission, "• • • the Court shall determine whether the Commission has justly considered all the facts concerning the injury, whether it has exceeded the powers

granted it by the Article, and whether it has misconstrued the law and facts applicable in the case decided. If the Court shall determine that the Commission has acted within its powers and has correctly construed the law and facts, the decision of the Commission shall be confirmed; otherwise it shall be reversed or modified. * * *" Under the plain provisions of this statute either the decision of the Commission should have been affirmed or reversed or modified. *Clauss v. Board of Education,* 181 Md. 513, 525, 30 A. 2d 779. The statute nowhere provides for a case to be remanded by the Trial Court to the Commission and appellees so admit in their brief. *Monumental Printing Co. v. Edell,* 163 Md. 551, 562, 164 A. 171. The order passed was without authority. The effect of this remand was to deny to the appellant his right of appeal to this Court. As pointed out by the appellant, whatever decision the Commission might make after taking the testimony required by this order, the appellant would be required to enter another appeal from that decision. The order therefore remanding the case to the Commission denied to the appellant the means of further prosecuting his appeal from the present decision of the Commission. As was said in the case of *Bragunier v. Penn,* 79 Md. 244, at page 246, 29 A. 12, "The order appealed from was unquestionably final, inasmuch as it denied the petitioner the means of further prosecuting his suit. It terminated the proceeding, and it is well settled that, when that is the case, an appeal will lie * * *". In the instant case this order passed by the Trial Court terminated the then present decision of the State Industrial Accident Commission and therefore was a final order from which an appeal lies. *Waverly Mutual & P. L. L. & Building Ass'n v. Buck,* 64 Md. 338, 342, 1 A. 561; *Adams v. Gillespie,* 151 Md. 52, 54, 133 A. 831; *Poe's Practice, 5th Ed., Section 826, page 801.* We therefore conclude that the remand should not have been made and that the appeal from that remand is properly before this Court for decision.

(2) The Trial Judge was clearly correct in expunging from appellant's answer and from the case Exhibits A, B and C and the testimony of Commissioner Thomas W. Koon relating to the method used by the Commission in

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arriving at amounts awarded under the "Other Cases" provision of the statute. These Exhibits A, B and C, were tables relating to the methods used by the Commission in deciding cases other than the instant case. On claimant's appeal no question is before us on the admissibility of the testimony of Commissioner Koon as to the method used by him in arriving at his decision in the instant case. In general, however, it may be stated that the determination whether a decision of an administrative agency is arbitrary is made from the decision itself and the record in the case, and not from the evidence of the members of the agency how it arrived at its conclusion.

(3) Appellant contends that the "Other Cases" provision of the statute as interpreted by the decision of this Court in the case of *Townsend v. Bethlehem-Fairfield Shipyard, Inc., supra,* is unconstitutional. Appellant argues here, as was argued in that case, that there should have been no limit less than $3,000 on the amount of permanent partial disability allowed. He argues, as was argued in the case of *Townsend v. Bethlehem-Fairfield Shipyard, Inc., supra,* hereinafter referred to in this opinion as the Townsend case, that the Commission has the duty to determine the average weekly wage and the wage earning capacity and to fix the weekly payments at 50% of the difference between the two. This question is not raised here, as it was not raised in the Townsend case, because the appellant was allowed the weekly maximum and no appeal was taken by the employer and insurer. He contends, however, as was contended in the Townsend case, that the Commission has no power to limit the number of weeks as long as the permanent partial disability continues, and that the only limitation, unless there is a subsequent modification or death, is when the aggregate weekly payments reach the maximum fixed by the statute. He argues here that to limit it otherwise is unconstitutional, in that there is a deprivation to the appellant without due process contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States and of the Twenty-third Article of the Declaration of Rights of Maryland, because the "Other Cases" paragraph, as construed, sets up no valid

guide or standard whereby a lesser amount may be determined. If the statutory provision, as construed, were unconstitutional, appellant could not maintain any claim under it. However, the contention that the statute is unconstitutional is without merit. Whether statutory guides or standards to effectuate a public policy are adequate or not, depends largely upon the nature of the subject matter. Compare *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 and *Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441. If the policy is sufficiently defined, it is immaterial that the process may involve the fixing of liquidated amounts without express definition. Compare *Chesapeake & Potomac Tel. Co. v. State Board of Forestry*, 125 Md. 666, 675, 94 A. 322.

The Statute under "Other Cases," and as interpreted by this Court, sets a maximum limit as to the amount of compensation to be allowed and gives to the Commission the right to determine the amount to be paid within this limit. The statute, the Workmen's Compensation Act, was held constitutional by this Court in the case of *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710. The general policy of the Compensation Act is set out therein, Chapter 800 of the Acts of 1914. The Act now in effect defines the public agency, the State Industrial Accident Commission, which is to apply it and the subparagraph in dispute sets a maximum limit.

The same section which provides for "Other Cases" also provides, for "disfigurements," that "compensation shall be allowed in the discretion of the Commission, for not less than ten weeks nor more than one hundred weeks, as the Commission may fix, in each case having due regard to the character of the mutilation and disfigurement as compared with mutilation and injury hereinbefore specifically provided for." In *Sweeting v. American Knife Co.*, 226 N. Y. 199, 123 N. E. 82, 83, affirmed as to constitutionality in *New York Cent. R. Co. v. Bianc*, 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161, the disfigurement provision of the New York statute was attacked on the ground that it violated due process, in that it left the matter largely to the discretion of the Commission. Judge Cardozo said: "The Commission has found that there has been serious facial disfigurement, and

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that an award of $2,500 is fair and equitable. • • • It is true that the commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into all the circumstances that will help to guide its judgment. • • • Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. • • • Nor does the statute become invalid because the commission has some discretion in fixing the amount. The Legislature may provide for such a method of 'adjustment, determination and settlement' as it will. • • • Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may, with a fair average of justice, be estimated in advance. But cases of disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation makes for justice alike to employer and to workman." To the same effect, see *Schwartz v. Mt. Vernon-Woodberry Mills*, 206 S. C. 227, 33 S. E. 2d 517.

The accident in the instant case happened on August 30, 1944, before the amendment by the Acts of 1945, Chapter 336, and the amendments thereby made are not applicable to the instant case, as they were not applicable to the Townsend case, supra. The changes made by that amendment are in amounts only. Article 101, Section 48, subsection 3, Flack's 1943 Supplement Annotated Code, was in effect at the time of this accident. This provides for compensation in cases of disability, partial in character but permanent in quality. This statute both before and after the 1945 amendments provides that compensation in cases of permanent partial disability shall be 66 2/3 percent of the average weekly wages. The maximum weekly compensation was $18 per week (increased to $20 by the Act of 1945), and the minimum $8 (increased to $10 by the Act of 1945), and the aggregate for permanent partial disability was $3,816 (increased to $4,240 by the Act of 1945). Loss of use of the back is not among the injuries specifically listed for which the statute fixes the number of weeks for which compensation shall be allowed. Loss of use of the back is covered by the paragraph in Subsection (3), supra, headed "Other Cases," which reads as follows: "In all other cases

in this class of disability the compensation shall be fifty per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment, or otherwise, if less than before the accident (but not to exceed eighteen dollars per week), payable during the continuance of such partial disability, but not to exceed three thousand dollars, and, subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest."

In this case, as in the Townsend case, supra, it was the duty of the Commission to find the wage earning capacity of the appellant after the accident and then award him 50% of the difference between his average weekly wages before the accident and the wage earning capacity thus found. If any of the parties felt aggrieved by the finding of the Commission as to the wage earning capacity of the claimant, an appeal could be had on that issue to the Courts. Under the decisions of this Court on appeal it is not within the province of the jury or of the Court sitting as a jury on appeal to find a verdict, or fix an amount, or to make an award for any amount, or to fix the rate or period of compensation, but merely to find the facts: *Bethlehem-Sparrows Point Shipyard, Inc. v. Demasiewicz,* Md., 50 A. 2d 799. This principle was clearly set out in the Townsend case, supra, where the earlier cases were thoroughly discussed and authorities cited. It is useless to recite those authorities again here.

In the case at bar, as the claimant was awarded the maximum weekly payment, there was no question of fact for the jury or for the court sitting as a jury on appeal. The case presented only a question of law as to whether the Commission abused its discretion or acted arbitrarily in fixing the period of time for which compensation was allowed and thereby in fixing the limit of $750. In the Townsend case, supra (47 A. 2d 372), in speaking of an award for permanent partial disability under "Other Cases," this Court said: "It has been the law for 18 years, and was the administrative practice for a number of years before the first decision of this Court in 1928 that the total award could be less than the maximum." Therefore the only question before the

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Trial Judge was whether the Commission had acted arbitrarily in limiting the award to $750.

The commission's discretion to determine the aggregate amount of compensation in "other cases" (within the statutory maximum) is not an arbitrary discretion, but must be exercised on the basis of substantial evidence. In effect, our construction of the "other cases" provision is that the aggregate amount of compensation shall be determined in the discretion of the Commission, in each case having due regard to the character of the permanent partial disability, and the impairment of wage-earning capacity therefrom, as compared with the scheduled cases of permanent partial disability specifically provided for. This construction is not reducible to a mathematical formula, but permits on appeal judicial review of abuse of discretion, within the limits set out in our recent opinion in *Bethlehem-Sparrows Point Shipyard v. Damasiewicz, supra.* For "other cases" the maximum aggregate is less than that fixed for scheduled permanent partial disabilities and still less than for permanent total disability. The Commission may properly consider these statutory differences in comparing the character of disabilities and the impairment of wage earning capacity in "other cases." As we have repeatedly held, the Commission may find impairment of earning capacity, i.e. potential loss of earnings, although no actual loss of earnings may have occurred

The Commission should, of course, have found the appellant's wage earning capacity, and an appeal would lie from such finding. But the appellant here had no such appeal because he received the maximum weekly award. The appellee took no appeal. If it is found that the award bears a reasonable relation to the injury suffered, and that there is substantial evidence to sustain it the Trial Court should not attempt to substitute its judgment for that of the Commission. In this case we are not able to find from the record that the Commission abused its discretion to the harm of the appellant. Its decision should, therefore, have been affirmed by the lower court.

Order reversed and case remanded for the entry of a judgment affirming the decision of the State Industrial Accident Commission, with costs to the appellant.